No. 79-1380

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MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE APPELLANT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. In our opening brief, we argued (at pages 19-23) that Section 1611(e) of the Social Security Act, 42 U.S.C. 1382(e), does not classify recipients of the Supplemental Security Income comfort items allowance on the basis of mental health. Accordingly, we argued that it is unnecessary for the Court to address the question whether a statute that discriminates against the mentally ill must be examined under a heightened, or "middle tier," level of scrutiny. The responses of appellees and amici to this argument are entirely unpersuasive. Indeed, those responses rest upon two fundamental misconceptions of the statutory scheme at issue here.

Appellees assert (Appellees' Br. 16-17, 21) that Section 1611(e)(1) generally permits all residents of public or private medical institutions to receive SSI benefits but

that the statute improperly singles out for exclusion only those individuals who are members of appellees' class, *i.e.*, only those residents of public mental institutions who are between the ages of 21 and 64. The plain language of Section 1611(e)(1), however, demonstrates that the exclusion is not limited to members of appellees' class. Rather, the statute provides for exclusion of all residents of public institutions (including public medical institutions) whose treatment is not funded under the Medicaid program. Thus, as we pointed out in our opening brief (at page 21), appellees are merely one of several groups of otherwise eligible persons who are denied reduced SSI benefits under the statutory exclusion because their treatment is not funded by the federal government under Medicaid. These other groups—and appellees as well—are ineligible for SSI benefits for reasons entirely unrelated to their mental health. The fact that the SSI statutory exclusion is based on the neutral factor of Medicaid eligibility and that numerous other persons who are not mentally ill are excluded together with appellees persuasively demonstrates that the classification is not the result of congressional antipathy toward the mentally ill.[1]

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[1]Appellees attempt to infer congressional antipathy by reference (Appellees' Br. 10-11, 18, 32-34) to the Social Security Act Amendments of 1950, which excluded from medical care benefits any otherwise eligible aged, blind, or disabled person "who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof." Ch. 809, Sections 303(a), 343(a) and 351, 64 Stat. 549, 554, 557-558. The validity of that statute, which was repealed when the Medicaid statute was enacted, is not at issue here. As we have shown in our opening brief (at pages 4-5 & n.3, 20-21, 28-29), under the current Medicaid statute numerous categories of mentally ill individuals receive federal assistance in paying for the costs of their treatment. By broadening federal assistance to the mentally ill under Medicaid, and by including the mentally disabled in the SSI program, Congress showed that it was in fact sympathetic to the needs of the mentally ill. See, *e.g.*, 111 Cong.

Appellees' reliance (Appellees' Br. 3, 18) on such cases as *Nyquist* v. *Mauclet*, 432 U.S. 1, 7-9 (1977), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972), is misplaced. In those cases it was argued that the challenged statutes did not classify on the basis of alienage (*Nyquist*) or legitimacy (*Weber*) because some members of those groups were entitled to benefits. The Court rejected this argument in both cases, concluding in *Nyquist* that "[t]he important points are that [the statute] is directed at aliens and that *only aliens are harmed by it*. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." 432 U.S. at 9 (emphasis added; footnote omitted). Here, unlike in *Nyquist* or *Weber*, the statutory classification does not exclude only mentally ill individuals; residents of public institutions who are not mentally ill but whose treatment is not funded under Medicaid are also denied reduced SSI payments.

Appellees argue (Appellees' Br. 18) that Section 1611(e)(1) invidiously discriminates against the mentally ill, notwithstanding the fact that appellees and others who are mentally disabled are eligible for SSI benefits precisely because of their mental disabilities. The tautology inherent in the approach urged by appellees is starkly illustrated by the statement in the brief of amici Private Psychiatric Hospital Associations (at pages 7-8, 11) that "[b]ut for their status as mentally ill persons, Appellee class members would be entitled" to reduced SSI benefits. As we have explained in our opening brief (at pages 19, 20 n.13), however, but for their status as mentally ill persons who are disabled by reason of their mental illness, appellees would never have qualified for any SSI benefits. Accordingly, the statute cannot be said to classify invidiously on the basis of mental health.

Rec. 15602 (1965) (remarks of Sen. Long); S. Rep. No. 404, 89th Cong., 1st Sess. 144-147 (1965); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972).

2. Appellees assert (Appellees' Br. 32-39) that the statutory exclusion has no rational basis and that Congress did not know what it was doing when it enacted the statute. As to the latter point, we note that amici Private Psychiatric Hospital Associations (Br. 12) agree with our submission that, in creating the classification embodied in Section 1611(e)(1), "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language [of the statute] was not intended." *Maine* v. *Thiboutot*, No. 79-838 (June 25, 1980), slip op. 6.

Appellees contend (Appellees' Br. 2, 5, 30) that, in adopting the SSI program, the federal government assumed full responsibility for providing income maintenance to indigent aged, blind and disabled persons, and that exclusion of appellees from eligibility for reduced SSI benefits is inconsistent with that legislative goal. But appellees' citations to the legislative record (Appellees' Br. 14 n.5) refer only to general statements concerning the SSI program; none of the cited remarks makes any reference to Section 1611(e)(1) or to the reduced benefit involved in this case.[2] The mere fact that Congress meant SSI to be a uniform program providing for the subsistence needs of eligible individuals (subject to state supplementation) does not mean that Congress also intended the federal government to assume full responsibility for providing a comfort items allowance to all persons undergoing

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[2]Nothing in the legislative history upon which appellees rely is inconsistent with the Ninth Circuit's statement in *Baur* v. *Mathews*, 578 F. 2d 228, 233 (1978), that the exception in Section 1611(e)(1) was motivated by considerations of economic efficiency and respect for the traditional roles of the states and local governments in caring for certain of their citizens.

treatment at state and locally funded public institutions.[3] If Congress had intended the provision of such an allowance to be a wholly federal responsibility, it would not have incorporated the Medicaid eligibility scheme into Section 1611(e)(1).

Contrary to appellees' assertion (Appellees' Br. 25-27), we do not contend that the same reasons for upholding the exclusion of appellees from Medicaid justify the denial of reduced SSI benefits. Instead, we argue that Congress could properly decide to provide benefits to public institution residents whose treatment the federal government is already funding under Medicaid, while excluding from benefits those public institution residents whose treatment is wholly funded by state and local governments. See *Baur* v. *Mathews*, 578 F. 2d 228, 233 (9th Cir. 1978). Appellees have failed to show why this distinction does not provide a rational basis for the federal statute.[4]

3. Appellees contend (Appellees' Br. 7, 46-47; see also Amici Private Psychiatric Hosp. Ass'n Br. 8, 15, 17-18, 21) that the mentally disabled are entitled to heightened scrutiny and that to deny them such judicial protection because of their inability to contribute to society is to

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[3]We note that at least one state, New York, has assumed responsibility for providing such a personal expense allowance to certain institutionalized individuals. See Brief of Amici State of New York and Commonwealth of Pennsylvania at page 2 n*.

[4]We do not assert that members of appellees' class (or others who are excluded from the reduced SSI benefits) have less of a need to purchase comfort items than other individuals who are not excluded. Rather, we contend that Congress could rationally determine that it was appropriate for state and local governments to provide for the comfort needs of those residents of public institutions whose treatment was entirely funded by state and local government sources. The arguments of amici National Association for Mental Health, *et al.*, are based primarily on considerations of need, and should be addressed to Congress, not the courts.

perpetuate society's stereotyped view of the mentally ill. But the inability of certain mentally ill individuals to contribute to society is the very basis for their inclusion in the SSI program. Here, too, appellees' argument falls of its own weight, since, if appellees were able to "engage in any substantial gainful activity" (42 U.S.C. 1382c(a)(3)(A)), they would not be disabled within the meaning of the statute and would not be eligible for SSI benefits.

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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